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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

CPC INTERNATIONAL, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the federal government to respond to public dangers resulting from the disposal of hazardous substances. Section 107(a)(2) of CERCLA provides that any corporation that "owned or operated any facility at which such hazardous substances were disposed of" shall be liable to the United States for the government's response costs at the facility. 42 U.S.C. 9607(a)(2). The question presented is:

Whether a corporation that actively participated in, and exercised control over, the operations of a subsidiary may be held liable under CERCLA as an operator of the subsidiary's facility.

PARTIES TO THE PROCEEDINGS

Petitioner is the United States of America. Respondents are CPC International, Inc., Aerojet-General Corporation, Cordova Chemical Company, Cordova Chemical Company of Michigan, and the Michigan Department of Environmental Quality (formerly the Michigan Department of Natural Resources).

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-54a) is reported at 113 F.3d 572. The opinion of the district court (Pet. App. 55a-129a) is reported at 777 F. Supp. 549. The initial opinion of the court of appeals (Pet. App. 130a-170a) is reported at 59 F.3d 584. The court of appeals' order granting rehearing (Pet. App. 171a-172a) is reported at 67 F.3d 586.

JURISDICTION

The court of appeals entered its initial decision on July 14, 1995. The court of appeals granted a petition for rehearing and suggestion for rehearing en banc on October 19, 1995, and it entered its en banc decision on May 13, 1997. On August 4, 1997, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 10, 1997. The petition was filed on that

date and was granted on December 12, 1997 (118 S. Ct. 621). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of Sections 101 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C. 9601 *et seq.*, are set out in the appendix to this brief. See App., *infra*, 1a-9a.

STATEMENT

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, authorizes the United States to protect the public from the release of hazardous substances and to recover the government's expenses from the responsible parties. The United States brought this CERCLA action against CPC International, Inc. (CPC), Aerojet-General Corporation (Aerojet), and other parties to recover the government's costs of responding to a release of hazardous substances at a former chemical manufacturing plant near Muskegon, Michigan. The United States District Court for the Western District of Michigan ruled, *inter alia*, that CPC and Aerojet are liable for the federal government's response costs, specifically finding the two corporations liable as operators of the facility. A divided panel of the court of appeals reversed the district court's decision as to CPC and Aerojet. On rehearing en banc, a divided court of appeals reached the same result and reversed the district court's determination that CPC and Aerojet are liable as operators.

1. "CERCLA is a comprehensive statute that grants the President broad power to command government agencies and private parties to clean up hazardous waste sites." *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 814 (1994). Congress enacted CERCLA in 1980, in response to the serious public health threats posed by abandoned or

inactive waste disposal facilities. See, *e.g.*, H.R. Rep. No. 1016, 96th Cong., 2d Sess. Pt. I, at 17-22 (1980). Committee reports describing those threats concluded that existing federal laws prospectively regulating hazardous waste disposal were "clearly inadequate to deal with this massive problem" and that special legislation was needed to "initiate and establish a comprehensive response and financing mechanism to abate and control the vast problems associated with [those] sites." *Id.* at 17-18, 22.[1]

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[1] The enactment of CERCLA has its roots in the history of federal legislation, beginning more than 30 years ago, addressing the problems associated with solid waste disposal. Congress initially used its taxing and spending authority to fund research and provide assistance to the States in dealing with a growing volume of waste materials. See Solid Waste Disposal Act, Pub. L. No. 89-272, Tit. II, 79 Stat. 997. Congress gradually recognized, however, that the interstate nature of the problem called for a national waste disposal policy. See S. Rep. No. 988, 94th Cong., 2d Sess. 5-6 (1976). In the Resource Recovery Act of 1970, Congress provided for the development of "recommended" waste disposal guidelines; that statute also authorized a "national disposal sites study" for hazardous wastes. Pub. L. No. 91-512, 84 Stat. 1227, 1232, 1233.

Six years later, Congress concluded that the nationwide dangers posed by the treatment, storage, and disposal of hazardous waste required a national regulatory program. Congress accordingly enacted the Resource Conservation and Recovery Act of 1976 (RCRA), Pub. L. No. 94-580, 90 Stat. 2795. This statute revamped the Solid Waste Disposal Act to provide, among other things, a nationwide cradle-to-grave system for regulating the transportation, treatment, storage, and disposal of hazardous wastes. See 42 U.S.C. 6921-6939b. Congress came to recognize, however, that the prospective permitting provisions of RCRA could not cure the problems associated with decades of unregulated disposal of hazardous waste. Four years later, Congress enacted CERCLA specifically to deal with the problem of waste disposal sites that were not likely to be addressed by RCRA's regulatory program. The legislative history of CERCLA shows that Congress intended to provide a comprehensive solution to the problem of harmful effects of past, present, and future disposal practices, thus completing the regulatory program begun with the enactment of RCRA.

CERCLA establishes a basic framework for government action in response to releases and threatened releases of hazardous substances. Section 104 of CERCLA authorizes the President of the United States to respond directly to releases or threatened releases by undertaking "removal" and "remedial" actions in conformity with the National Contingency Plan (NCP). 42 U.S.C. 9604.[2] Section 105 directs that the NCP shall include a National Priorities List (NPL) identifying the sites that pose the most serious need for cleanup. 42 U.S.C. 9605; see 40 C.F.R. Pt. 300 (setting out the NCP and NPL). Section 106 of CERCLA grants the President authority to issue orders and to seek injunctive relief to compel persons to respond to releases or threats of release. 42 U.S.C. 9606.[3]

CERCLA also provides a mechanism for financing government-initiated cleanups of hazardous waste sites. Upon satisfying statutory conditions, the United States may use the "Hazardous Substance Superfund" as the initial source of funding for federal response actions. See CERCLA §§ 101(11), 104, 42 U.S.C. 9601(11), 9604; 26 U.S.C. 9507. Congress was aware when it enacted CERCLA, however, that the costs of government response actions would likely greatly exceed the Superfund. See S. Rep. No. 848, 96th Cong., 2d Sess. 17-18 (1980); H.R. Rep. No. 1016, *supra*, at 20. Congress therefore established a liability scheme to enable the government to recover its response costs and to ensure "that those responsible for

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[2] CERCLA distinguishes between "removal" actions, § 101(23), 42 U.S.C. 9601(23), and "remedial" actions, § 101(24), 42 U.S.C. 9601(24), which are each considered a form of "response," § 101(25), 42 U.S.C. 9601(25). The NCP sets forth the EPA regulations governing the selection and implementation of response actions. See 40 C.F.R. Pt. 300.

[3] The President has delegated most of his authority for administering CERCLA to the Administrator of the Environmental Protection Agency (EPA). Exec. Order No. 12,580, 3 C.F.R. 193 (1988 comp.), *reprinted in* 42 U.S.C. 9615 note.

any damage, environmental harm, or injury from chemical poisons bear the costs of their actions." S. Rep. No. 848, *supra*, at 13; H.R. Rep. No. 1016, *supra*, at 17. Accordingly, the United States may bring judicial actions against responsible parties under Section 107 of CERCLA to recover the government's response costs and replenish the Superfund. CERCLA § 107(a)(A), 42 U.S.C. 9607(a)(A). Section 107 allows parties other than the federal government to recover necessary costs of response in certain circumstances and, in and conjunction with Section 113, allows liable parties to seek contribution from other liable parties. See CERCLA §§ 107(a)(B), 113(f)(1), 42 U.S.C. 9607(a)(B), 9613(f)(1).

The United States is entitled to cost recovery under Section 107 if it establishes four basic elements that, Congress has determined, justify the imposition of liability. The United States must show that: (1) there has been a "release" or "threatened release" of "hazardous substances" from a site; (2) the site is a "facility"; (3) the release or threatened release has caused the United States to incur "response costs"; and (4) the defendant is a party who, under the standards that Congress has set out in CERCLA, is responsible for the government's incurring of those costs. CERCLA § 107(a), 42 U.S.C. 9607(a); see, *e.g.*, *B.F. Goodrich Co.* v. *Murtha*, 958 F.2d 1192, 1198 (2d Cir. 1992); *United States* v. *Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1378-1379 (8th Cir. 1989).

Section 107(a) specifically identifies four categories of parties who are potentially liable for the government's response costs. They are: (1) owners and operators of a facility at which there is a release or threatened release of a hazardous substance; (2) persons who owned or operated the facility at the time of a hazardous substance disposal; (3) persons who arranged for disposal or treatment of a hazardous substance at the facility; and (4) persons who selected the site and transported hazardous substances to

the facility. CERCLA § 107(a)(1)-(4), 42 U.S.C. 9607(a)(1)-(4).[4]

The courts have consistently ruled that, once the United States has established the four elements of CERCLA liability, the responsible party is strictly liable, without any additional showing of causation, for the government's response costs. *E.g.*, *United States* v. *Kayser-Roth Corp.*, 910 F.2d 24, 26-27 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); *United States* v. *R.W. Meyer, Inc.*, 889 F.2d 1497, 1507 (6th Cir. 1989), cert. denied, 494 U.S. 1057 (1990); *Aceto Agric. Chem.*, 872 F.2d at 1377; *United States* v. *Monsanto Co.*, 858 F.2d 160, 167 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); see also S. Rep. No. 848, *supra*, at 13-14.[5] The courts have also consistently ruled that, if the harm from the release of hazardous substances is indivisible, the responsible parties are jointly and severally liable. *E.g.*, *Kayser-Roth*, 910 F.2d at 26; *R.W. Meyer, Inc.*, 889 F.2d at 1507; *Aceto Agric. Chem.*, 872 F.2d at 1377; *Monsanto*, 858 F.2d at 172. See S. Rep. No. 848, *supra*, at 13 ("To establish provisions of liability any less than strict, joint, and several liability would be to condone a system in which innocent victims bear the actual burden of releases, while those who conduct commerce in

[4] CERCLA provides definitions of a number of the relevant terms, including, "facility," "hazardous substance," "owner or operator," "person," "release," "transport," and "disposal." See CERCLA § 101, 42 U.S.C. 9601 (Supp. II 1996).

[5] Section 101(32) of CERCLA, 42 U.S.C. 9601(32), provides that the terms "liable" and "liability" shall be construed to be the standard of liability of Section 311 of the Clean Water Act (CWA), 33 U.S.C. 1321. The standard under Section 311 of the CWA is one of strict liability. See, *e.g.*, *Monsanto Co.*, 858 F.2d at 167-168 n.11. Hence, CERCLA's reference to that standard manifests Congress's intent that responsible parties are strictly liable under CERCLA.

hazardous substances which cause such damage benefit with relative impunity.").[6]

Responsible parties who are found jointly and severally liable may obtain an equitable allocation of costs by seeking contribution from other responsible parties. CERCLA § 113(f), 42 U.S.C. 9613(f). See *R.W. Meyer, Inc.*, 889 F.2d at 1507; *Monsanto*, 858 F.2d at 173; see also H.R. Rep. No. 253, 99th Cong., 1st Sess. Pt. I, at 79 (1985). "In resolving contribution claims, the court may allocate response costs among liable parties using such equitable factors as the court determines are appropriate." CERCLA § 113(f)(1), 42 U.S.C. 9613(f)(1).

2. This case arises out of the United States' attempt to recover its costs of responding to acutely hazardous conditions at a former chemical manufacturing plant in Dalton Township, Michigan, known as the "Muskegon" site. A series of chemical companies extensively contaminated that site through operations from 1959 through 1986.

a. The Ott Chemical Company (Ott I), a publicly traded Michigan corporation, which was founded and managed by principal shareholder Arnold Ott, owned the Muskegon site from 1957 to 1965. Pet. App. 63a-64a. Ott I located its sole chemical manufacturing facility at that site, and it engaged in various activities that resulted in the disposal and release of hazardous substances. For example, Ott I discharged waste water containing hazardous substances into two unlined lagoons at one part of the site, it buried drums containing hazardous substances at another, it spilled hazardous substances in the process and loading

[6] CERCLA imposes liability subject to only three limited defenses set forth in Section 107(b), 42 U.S.C. 9607(b). Section 107(a) provides that these defenses are the only allowable ones, and courts have interpreted them narrowly in keeping with CERCLA's remedial purposes. See, *e.g.*, *B.F. Goodrich Co.*, 958 F.2d at 1198; *Monsanto Co.*, 858 F.2d at 170.

areas of the site, and it dumped hazardous substances in a wooded portion of the site. By 1964, test results showed that Ott I's disposal practices had contaminated the soil, surface water, and the groundwater flowing beneath the Muskegon site. *Id.* at 60a-62a.

b. In 1965, CPC (then known as the Corn Products Company) acquired Ott I by incorporating a new subsidiary that purchased Ott I's assets in exchange for CPC stock and assumed the name of Ott Chemical Company (Ott II). Pet. App. 59a, 65a-66a. CPC had acquired Ott I as an avenue through which CPC could enter into the chemical manufacturing business. *Id.* at 64; see also C.A. App. 1923, 1932. Arnold Ott became a vice-president and scientific director of CPC. Ott I changed its name to the Muskegon Chemical Company and shortly thereafter ceased to exist. Pet. App. 66a.

Under CPC's ownership, Ott II continued and expanded the chemical manufacturing activities and waste disposal activities at the Muskegon site. Pet. App. 66a-67a.[7] CPC actively participated in and routinely exerted control over Ott II's business, including environmental matters, through the direct involvement of Arnold Ott and other CPC officers in Ott II's policy decisions and day-to-day operations. *Id.* at 67a-77a. CPC continued those operations through 1972. *Id.* at 78a.[8]

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[7] CPC planned rapid growth for Ott II and, following its acquisition of Ott II, the operations at the site "significantly increased as CPC contributed millions of dollars to expansion efforts." Pet. App. 66a-67a. That increase in production, in turn, resulted in "substantially greater amounts of wastewater and chemical waste" being disposed of in the unlined lagoons and elsewhere at the site. *Id.* at 67a.

[8] From 1965 to 1968, Ott II's sole business involved the operations at the Muskegon site. In late 1968, Arnold Ott and James Eiszner, both CPC officers at the time, made the decision to merge Ott II with Wica Chemical, Inc. (another wholly owned subsidiary of CPC) "into one company, which would become a division of Corn Products Company." See Trial Exh. 505 (Trial Tr. 12-14; C.A. App. 803); Eiszner Deposition Testimony, Vol. II (6/26/90) at 253 (Trial Tr. 12-14; C.A. App. 974). Thereafter, Ott II also included the chemical manufacturing plant in Charlotte, North Carolina, which was referred to as the "Charlotte" or "Wica" division. See, *e.g.*, C.A. App. 2329, 2334.

c. In 1972, CPC sold Ott II to Story Chemical Company (Story), a Georgia corporation. Pet. App. 59a, 78a. For six months following the sale, CPC "operated the Ott II business for Story." *Ibid.* Story continued Ott II's operations, but soon encountered financial problems. In 1976, it filed for bankruptcy protection. Story was adjudicated bankrupt in 1977, and title to the Muskegon site passed to the bankruptcy trustee. *Ibid.* The Michigan Department of Natural Resources (MDNR) recognized that the Muskegon site posed severe environmental hazards, and it became actively involved in efforts to attract a buyer for the site. *Id.* at 79a-81a.

d. In 1977, after extensive discussions with MDNR, Aerojet arranged to acquire the Muskegon site. Pet. App. 81a-83a, 92a. Aerojet created a wholly owned California subsidiary called Cordova Chemical Company (Cordova/California) that purchased the Muskegon site from the Story bankruptcy trustee. *Id.* at 82a-83a, 93a. In connection with that purchase, Cordova/California and MDNR entered into an agreement under which Cordova/California agreed to undertake certain cleanup actions, MDNR agreed to share in the funding of those actions, and MDNR agreed to indemnify Cordova/California for other expenses. *Id.* at 83a-91a.[9]

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[9] The Michigan state courts have held that, because of that agreement, MDNR must indemnify Aerojet and its Cordova subsidiaries against any CERCLA liability that they may incur at the Muskegon site. See *Cordova Chemical Co.* v. *MDNR*, 536 N.W.2d 860 (Ct. App. 1995), appeal denied, 554 N.W.2d 319 (Mich. 1996)(Table).

e. In 1978, shortly before commencement of chemical manufacturing activities at the site, Cordova/California created a wholly owned Michigan subsidiary, Cordova Chemical Company of Michigan (Cordova/Michigan), and transferred ownership of the Muskegon site to that company. Pet. App. 93a-94a. With the active participation of Aerojet, the Cordova companies conducted chemical production activities at the Muskegon site until 1986. *Id.* at 93a-100a.

f. In 1981, shortly after the enactment of CERCLA, the EPA identified the Muskegon site as posing serious public health risks. In 1982, the EPA placed the site on the NPL. See p. 4, *supra*; 40 C.F.R. Pt. 300, Apps. A and B (Table 1) (1996). Since that time, the EPA has incurred response costs in developing and implementing a comprehensive, multi-million dollar remedial plan to protect the public from harm. The final remedy will decontaminate the soil, surface water, and groundwater at the site. See Pet. App. 62a-63a.

3. The United States filed a cost recovery action under Section 107 of CERCLA naming five entities as responsible parties under Section 107 of CERCLA: (1) CPC; (2) Aerojet; (3) Cordova/California; (4) Cordova/Michigan; and (5) Arnold Ott. In anticipation of the United States' suit, CPC had already filed an action for contribution from Aerojet,Cordova/California,Cordova/Michigan,and MDNR. CPC also filed a third party complaint against its insurer. In turn, Aerojet and the Cordova subsidiaries filed contribution actions against CPC and the MDNR. The MDNR later filed a counterclaim against CPC and a cross-claim against Aerojet and the Cordova subsidiaries for cost recovery and contribution. The district court consolidated the actions and scheduled them for trial in three phases addressing, sequentially, the issues of liability, remedy, and insurance coverage. Pet. App. 56a n.1. On the eve of

the liability trial, Arnold Ott reached a settlement with the United States respecting his liability. *Id.* at 56a n.2.

The district court conducted a 15-day bench trial on the liability of the remaining parties. Those parties stipulated that there had been "releases" of "hazardous substances" from the Muskegon site, that the Muskegon site is a "facility," and that the United States had incurred reimbursable "response costs." See Pet. App. 63a. The trial accordingly focused on whether the non-settling entities had owned the facility, operated the facility, or arranged for disposal of wastes at the facility within the meaning of Section 107(a) of CERCLA. In resolving those issues, the district court specifically concluded that CPC and Aerojet are liable under Section 107(a)(2) of CERCLA on the ground that they had each directly participated in the operation of the Muskegon site during a relevant time period. *Id.* at 128a-129a; see *id.* at 65a-78a, 92a-100a, 110a-112a, 123a-125a.[10]

The district court concluded that "a parent corporation is directly liable under section 107(a)(2) as an operator only when it has exerted power or influence over its subsidiary by actively participating in and exercising control over the subsidiary's business during a period of disposal of hazardous waste." Pet. App. 107a. The court found CPC and Aerojet liable under that standard. See *id.* at 110a-112a, 123a-125a.

The district court set out extensive factual findings in support of its conclusion. In relation to CPC, the court specifically found, for example, that:

> (1) "CPC actively participated in, and at times controlled, the policy making decisions of its subsidiary through its representation on the Ott II board of

[10] The district court made a number of other liability rulings. See Pet. App. 128a-129a. Those rulings are not relevant to the resolution of the question presented by this case.

directors," which "functioned as a major source of power and decision-making at the company" (Pet. App. 67a);

(2) "CPC also actively participated in and exerted control over day-to-day decision-making at Ott II through representation in the highest levels of the subsidiary's management" (*id.* at 69a);

(3) "CPC's development company also actively participated in and exerted control over policy-making at Ott II in efforts to enhance performance, shape decisions, and affect personnel changes" (*id.* at 72a);

(4) "CPC actively participated in Ott II environmental matters" (*id.* at 74a);

(5) "CPC also exerted significant control over Ott II's finances," "actively participated in some Ott II labor matters," and "also participated in other aspects of Ott II's business" (*id.* at 76a, 77a).

The court determined that "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters into the realm of an active operator." *Id.* at 111a.

The district court similarly found that Aerojet, like CPC, "operated the site through active participation and pervasive control over the businesses of both Cordova/California and Cordova/Michigan," and that "Aerojet's conduct toward its subsidiaries extended well beyond the activities that are merely indicative of a parent's general oversight of a wholly owned subsidiary." Pet. App. 124a. The court accordingly concluded that Aerojet, like CPC, is directly liable as an operator under Section 107(a)(2). *Id.* at 123a-125a.

The district court noted that, while CERCLA imposes direct liability on a corporation based on its own participation in the operation of a facility, a corporation may also be subject to vicarious liability for a subsidiary's actions through the application of equitable state-law principles that allow a court to disregard the separate corporate identities of a parent and its subsidiary "to prevent fraud, illegality, or injustice." Pet. App. 108a, 109a. The court found the evidence sufficient under that so-called "veil-piercing" theory to hold Aerojet vicariously liable as a present owner of the facility under Section 107(a)(1) of CERCLA. *Id.* at 119a-122a. The court, however, concluded that in light of its holding that Aerojet and CPC were directly liable under Section 107(a)(2) based on their own actions, there was no need to apply the state veil-piercing theory in that context. *Id.* at 112a, 124a-125a.

4. A divided panel of the Sixth Circuit reversed various aspects of the district court's decision, including its conclusion that CPC and Aerojet are liable as past operators of the Muskegon facility. See Pet. App. 130a-170a. The panel majority ruled, as a matter of law, that CPC and Aerojet cannot be held liable under CERCLA as operators of the Muskegon site unless the evidence provides a basis for disregarding their corporate form under state-law veil-piercing principles. *Id.* at 143a-144a. The court also held that, under Michigan state law, the corporate veil may be pierced only upon a finding of a fraudulent purpose. *Id.* at 144a.

5. The United States filed a petition for rehearing and suggestion for rehearing en banc on the question of whether CPC and Aerojet are directly liable as operators under Section 107(a)(2) of CERCLA. The court of appeals granted the petition and vacated the panel decision. Pet. App. 171a-172a. On rehearing en banc, a divided court of appeals reversed the district court's judgment with respect to the two parent corporations. *Id.* at 1a-54a.

In a 7 to 5 vote, the court of appeals rejected the legal theory, urged by the United States and relied upon by the district court, that a parent corporation may be held liable under CERCLA as an "operator" of a facility by virtue of the parent corporation's active participation in and exercise of control over the management and operations of a subsidiary that owns the facility. The court acknowledged that a parent corporation could "conceivably" be liable as an operator in some situations:

> At least conceivably, a parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate the facility alongside its subsidiary.

Pet. App. 12a. The court concluded, however, that "this is not a theory of operator liability relied upon by the district court, or alluded to in its opinion." *Ibid.*[11]

The court characterized the district court's decision as holding that "parent corporations can attain operator status by exerting significant control over the operations of their subsidiaries." Pet. App. 13a. It specifically rejected that ruling, stating:

> [W]here a parent corporation is sought to be held liable as an operator pursuant to 42 U.S.C. § 9607(a)(2) based upon the extent of its control of its subsidiary which owns the facility, the parent will be liable only when the requirements necessary to pierce the corporate veil are met.

Id. at 15a. The court additionally stated that the federal government must satisfy the state law standards for piercing the corporate veil, which in Michigan would require a showing that "adherence to the fiction of separate corporate existence would sanction a fraud or promote an injustice." *Id.* at 16a. The court concluded that, under Michigan law, the facts in this case did not provide an adequate basis for piercing the corporate veil with respect to the two parent corporations involved in this case. *Id.* at 16a-18a, 21a-22a.[12]

Judge Ryan, joined by four other judges, dissented from the court's decision. Pet. App. 32a-54a. The dissenting judges criticized the majority for failing to adhere to the plain language of CERCLA's liability provisions. See *id.* at 32a-34a. They concluded that Section 107(a)(2) subjects a parent corporation to direct liability as an operator of a facility if the facts show that the parent corporation "actually operat[ed] a facility, regardless of the nature of the entity's ostensible interest in the facility." *Id.* at 34a. The dissenting judges noted that the majority's reasoning was particularly unpersuasive in the face of the numerous decisions of other courts of appeals, which supported the district court's conclusion that a parent corporation may be liable as an operator of a subsidiary's facility through its active participation in and control over the day-to-day management of the subsidiary's business. *Ibid.* at 34a-41a.[13]

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[11] The court's en banc decision is basically identical to the panel decision except for the statement that direct operator liability is "conceivabl[e]" under Section 107(a). Compare Pet. App. 11a-18a with *id.* at 140a-145a. The court made that statement in response to the dissent's criticism of its holding. See *id.* at 17a n.5.

[12] In addition, the court of appeals directed the district court on remand to make further findings regarding whether disposal of hazardous substances occurred while Aerojet and the Cordova companies owned the site and to revisit its conclusion that those companies had failed to prove their entitlement to a third party defense under Section 107(b)(3) of CERCLA, 42 U.S.C. 9607(b)(3). See Pet. App. 22a-24a.

[13] The dissenting judges also criticized the majority's characterization of the district court's factual findings and its interpretation of Michigan law. Pet. App. 41a-50a. Judge Merritt, concurring in part and dissenting in part, filed a separate opinion stating that federal

Since issuing its decision in this case, the en banc court of appeals has also addressed whether a sole shareholder of a corporation may be held liable as an operator under CERCLA. *Donahey* v. *Bogle*, 129 F.3d 838 (1997). The en banc court extended its reasoning in this case to that situation and concluded that "a stockholder is not liable as an operator as defined by § 107(a)(2) of CERCLA unless circumstances justify piercing the corporate veil." *Id.* at 843. A petition for a writ of certiorari has been filed in that case. See *Donahey* v. *Livingstone*, petition for cert. pending, No. 97-1163 (filed Jan. 9, 1998).

SUMMARY OF ARGUMENT

The court of appeals misinterpreted the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq*, an important federal statute governing the United States' authority to respond to the public dangers posed by the release of hazardous substances. In response to the government's cost recovery efforts, the court of appeals adopted a rule that absolves parent corporations of liability, even though they actively participated in the operation of a facility and share responsibility for the conditions at a hazardous waste site. The court of appeals' rule would erroneously engraft a judicially created exception onto Section 107(a)(2) by replacing the federal liability standard with state law standards that govern the equitable doctrine of piercing the corporate veil.

A. The court of appeals' ruling is contrary to the plain terms of the statute. Section 107(a)(2) of CERCLA establishes a federal liability standard that imposes direct liability on "any person," including a corporation, that "operates" a facility at the time of disposal of hazardous

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common law, and not state law, governs the standard for piercing the corporate veil. *Id.* at 24a-34a.

substances. In accordance with the ordinary meaning of Section 107(a)(2)'s terms, a corporation "operates" a facility if it actively participates in, and exercises control over, the running of the facility. Section 107(a)(2) and other relevant CERCLA provisions express Congress's intent to impose liability on any entity that operates a facility, irrespective of its corporate form. Accordingly, a parent corporation is directly liable as an operator under Section 107(a)(2) if it actively participates in, and exercises control over, the operations of a subsidiary's facility. That result is consistent with CERCLA's fundamental goal of imposing the costs of cleanup on those who are responsible for creating the hazardous situation.

B. Rejecting that straightforward reading of CERCLA, the court of appeals erroneously concluded that a parent corporation may be held liable under Section 107(a)(2) only when state law requirements for piercing the corporate veil are met. The court based its construction on a misreading of CERCLA's provisions dealing with abandoned facilities and, as a result, placed itself in conflict with the contrary rulings of the other courts of appeals that have considered the issue.

C. The court of appeals' decision to employ state law rules for "piercing the corporate veil" overlooks that CERCLA subjects entities to *direct liability*, without regard to corporate form, based on the entity's *own* actions in operating the facility. There is no need to consider state veil-piercing rules, which subject parent corporations to vicarious responsibility based on equitable considerations, when the parent corporation is directly liable based on its own actions. Congress is entitled to enact legislation that creates a federal liability standard that applies without regard to considerations of corporate form. The court of appeals' approach, which would impose additional conditions for liability drawn from state law rules that were developed in other contexts, would thwart the

fairness and efficiency of a federal program that Congress designed to address a national problem. By subjecting federal liability to the vagaries of state law veil-piercing rules, the court's decision would require extensive litigation over the content of state law rules, subject similarly situated parties to inconsistent results, and promote geographic inconsistency in a national program.

D. The district court correctly concluded that the express language of Section 107(a)(2) imposes liability on a parent corporation when it actively participates in, and exercises control over, the operations of the subsidiary's facility. Applying that standard, the district court properly concluded that CPC and Aerojet, during separate time periods, had each "operated" the Muskegon site. While the court of appeals held that the district court had applied the wrong standard of liability, it did not reject or cast doubt on those factual findings and, indeed, relied upon them. This Court should therefore reverse the judgment of the court of appeals with respect to the operator liability of CPC and Aerojet under Section 107(a)(2).

ARGUMENT

THE DISTRICT COURT CORRECTLY CONCLUDED THAT SECTION 107(a)(2) OF CERCLA SUBJECTS CPC AND AEROJET TO LIABILITY AS OPERATORS OF THE MUSKEGON SITE

CERCLA creates a federal mechanism for addressing the problem posed by decades of improper disposal of toxic chemicals. Congress determined that the national scale of the hazardous waste disposal problem requires a comprehensive national solution. CERCLA accordingly authorizes the United States to undertake direct response actions throughout the country to protect the public from the release of hazardous substances, using federal funds earmarked for that purpose. See CERCLA § 104, 42 U.S.C. 9604. Congress also determined that the parties

responsible for creating hazardous conditions should pay for the cleanup of hazardous waste sites. CERCLA accordingly provides that the United States may recover its response costs from responsible parties according to a specific federal liability standard. See CERCLA § 107, 42 U.S.C. 9607.

Section 107 of CERCLA sets out the federal standard for liability. Section 107(a), in relevant part, states:

> Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section —
>
> * * * * *
>
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of

shall be liable for the government's response costs. 42 U.S.C. 9607(a).

CERCLA defines the term "person" to include a broad range of entities, including corporations and other business organizations. CERCLA § 101(21), 42 U.S.C. 9601(21). Thus, CERCLA clearly envisions that a corporation may be liable as an operator of a facility. The issue in this case accordingly turns on whether CPC and Aerojet "operated" the Muskegon site, which is the facility in question in this case. See Pet. App. 63a; CERCLA § 101(9), 42 U.S.C. 9601(9). The district court correctly found CPC and Aerojet liable as operators. See Pet. App. 55a-129a.

A. CERCLA, By Its Plain Terms, Subjects A Parent Corporation That Actively Participated In, And Exercised Control Over, The Operation Of A Subsidiary's Facility To Direct Liability As An Operator Of The Facility

1. The ordinary meaning of "operate"

"The starting point in statutory interpretation is 'the language [of the statute] itself.'" *Ardestani* v. *INS.*, 502 U.S. 129, 135 (1991) (alteration in original) (quoting *United States* v. *James*, 478 U.S. 597, 604 (1986)). CERCLA defines the "owner or operator" of a facility to include "any person owning or operating such facility," CERCLA § 101(20)(A), 42 U.S.C. 9601(20)(A), but it does not specifically define the term "operate." Under settled principles of statutory construction, that term should be construed in accordance with its "ordinary and natural meaning." *Bailey* v. *United States*, 116 S. Ct. 501, 506 (1995); see *Walters* v. *Metropolitan Educ. Enter., Inc.*, 117 S. Ct. 660, 664 (1997); *FDIC* v. *Meyer*, 510 U.S. 471, 476 (1994); *Smith* v. *United States*, 508 U.S. 223, 228 (1993); *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); see also *Edward Hines Lumber Co.* v. *Vulcan Materials Co.*, 861 F.2d 155, 156 (7th Cir. 1988) (the statutory terms "owner or operator" in CERCLA should have "their ordinary meanings rather than unusual or technical meanings").

Ordinarily, to "operate" a facility means to "direct the working of" or "to manage" the facility. See, *e.g.*, *The Oxford English Dictionary* (2d ed. 1989) (defining "to operate" as "[t]o direct the working of; to manage, conduct, work (a railway, business, etc.)"); *The Random House Dictionary of the English Language* (2d ed. 1987) (defining "to operate" as "to put or keep (a factory, industrial system, ranch, etc.) working or in operation"); *Webster's Third New International Dictionary* (1967) (defining "to operate" as "to manage and put or keep in operation

whether with personal effort or not <*operated* a grocery store>"). Hence, under the ordinary meaning of the statutory terms, an entity (including a corporate entity) "operates" a facility if it actively participates in, and exercises control over, the running of the facility.

2. The statutory context

This Court has also stated that "'the meaning of statutory language, plain or not, depends on context.'" *Bailey*, 116 S. Ct. at 506 (quoting *Brown* v. *Gardner*, 513 U.S. 115, 117 (1994)); *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). Accordingly, this Court may consider not only the bare meaning of the word "operate" itself, but also its placement and purpose in the statutory scheme. See *Bailey*, 116 S. Ct. at 506. Reading the statutory language in context "leaves no room to doubt that Congress has singled out operators for liability, irrespective of their corporate form." Pet. App. 35a (Ryan, J., dissenting).

CERCLA imposes liability on any person who at the time of disposal of any hazardous substance "owned *or* operated" the facility. See CERCLA § 107(a)(2), 42 U.S.C. 9607(a)(2) (emphasis added). Section 107(a)(2)'s use of those terms in the disjunctive indicates Congress's intent to establish two distinct categories of liability for the environmental cleanup of a facility: Liability may be predicated on one's status as an owner of a facility *or* on one's actions in operating the facility. As the First Circuit has observed:

> Congress, by including a liability category in addition to owner ("operators") connected by the conjunction "or," implied that a person who is an operator of a facility is not protected from liability by the legal structure of ownership. Given this grammatical construction and the broad definition of "person," corporate status, while relevant to determine ownership, cannot shield a person from operator liability.

United States v. *Kayser-Roth Corp.*, 910 F.2d 24, 26 (1st Cir. 1990), cert. denied, 498 U.S. 1084 (1991); see also *Schiavone* v. *Pearce*, 79 F.3d 248, 255 (2d Cir. 1996); *Lansford-Coaldale Joint Water Auth.* v. *Tonolli Corp.*, 4 F.3d 1209, 1221 n.11 (3d Cir. 1993). Section 107(a)(2)'s language and the pertinent statutory definitions indicate that "Congress intended to impose liability on *any* entity actually operating a facility, regardless of the nature of the entity's ostensible interest in the facility." Pet. App. 34a (Ryan, J., dissenting).

The plain terms of the statute impose operator liability based on the actual conduct of responsible parties and not merely on their formal corporate relationship to the site. Furthermore, the liability extends to an entity that operated "*any* facility at which such hazardous substances were disposed of." CERCLA § 107(a)(2), 42 U.S.C. 9607(a)(2) (emphasis added). That language also indicates that Congress intended to impose liability on an actual operator without regard to whether a parent or its subsidiary owned the facility in question.

3. Related CERCLA provisions

The Court has further stated that, when construing a statute, it looks not only to "the language itself" and the "specific context in which [it] is used," but also to "the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 117 S. Ct. 843, 846 (1997). Related portions of the "owner or operator" definition in Section 101(20) of CERCLA are instructive in determining the meaning of the word "operate." See 42 U.S.C. 9601(20). When Congress enacted CERCLA in 1980, it defined the term "owner or operator" in Section 101(20) to exclude "a person who, without participating in the management of a * * * facility, holds indicia of ownership primarily to protect his security interest in the * * * facility." See Pub. L. No. 96-510, Tit. I, § 101(20)(A), 94 Stat. 2769. That so-

called "lender exemption" indicates that, while Congress was willing to create an exception from the liability scheme for lenders who, by virtue of a security interest, might qualify as "owners" under the ordinary meaning of that term, Congress was not willing to extend that exemption to lenders who, by "participating in the management" of the facility, fell within the ordinary meaning of an "operator." By the same reasoning, a stockholder or parent corporation that "participat[es] in the management" of a facility is potentially liable as an "operator."[14]

Congress's recent amendment of CERCLA supports that interpretation. In 1990, the Eleventh Circuit issued a decision that potentially narrowed the scope of the lender exemption, *United States* v. *Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), cert. denied, 498 U.S. 1046 (1991). In response, EPA promulgated a regulation to clarify the scope of the protection that the exemption provided. See 57 Fed. Reg. 18,344 (1992). The District of Columbia Circuit invalidated the regulation on the ground that EPA lacked authority to adopt a regulation determining the scope of liability under CERCLA. See *Kelley* v. *EPA*, 15 F.3d 1100 (D.C. Cir. 1994), cert. denied, 513 U.S. 1110 (1995). Congress reacted to that decision by amending CERCLA to clarify the scope of the lender exemption, using substantially the same language and analysis that EPA had employed. See Asset Conservation, Lender Liability, and Deposit Insurance Protection Act of 1996, Pub. L. No. 104-208, Tit. II, § 2502(b), 110 Stat. 3009-464 (to be codified at 42 U.S.C. 9601(20)(E)-(F) (Supp. II 1996)). The amended

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[14] See *New York* v. *Shore Realty Corp.*, 759 F.2d 1032, 1052 (2d Cir. 1985) ("this exception implies that an owning stockholder who manages the corporation * * * is liable under CERCLA as an 'owner or operator'"); accord *United States* v. *Kayser-Roth Corp.*, 910 F.2d at 26 n.6; see also Pet. App. 33a (Ryan, J., dissenting).

version of Section 101(20) indicates, in accord with the original provisions of CERCLA, that Congress intended to impose liability on any entity that actually participated in, and exercised managerial or decisionmaking control over, a facility's operations.

Section 101(20), as amended, retains the original language of the lender exemption, but also specifies the range of protected activities that may be undertaken by lenders without incurring liability and the kind and degree of involvement that would result in CERCLA liability. See 42 U.S.C. 9601(20)(E), (F), and (G) (Supp. II 1996). Of particular relevance here, Section 101(20)(F) provides that a lender would be "considered to participate in management," and therefore would not be entitled to the exemption from the definition of "owner or operator," if it:

> (I) exercises decisionmaking control over the environmental compliance related to the vessel or facility, such that the person has undertaken responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or
>
> (II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility —
>
> > (aa) for the overall management of the vessel or facility encompassing day-to-day decisionmaking with respect to environmental compliance; or
> >
> > (bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance.

42 U.S.C. 9601(20)(F)(ii)(I)-(II) (Supp. II 1996). The amendment later defines the term "operational function" to include "a function such as that of a facility or plant manager, operations manager, chief operating officer, or

chief executive officer." 42 U.S.C. 9601(20)(G)(v) (Supp. II 1996).

Section 101(20)(F) adopts the approach that EPA set out in the preamble to its rule. EPA concluded that the distinction between "owners or operators" and persons entitled to the lender exemption should depend on whether the person "actually exercises decisionmaking control over the facility's operations from within the facility's hierarchy." 57 Fed. Reg. at 18,359. Under that approach, a person "performing the functions of a plant manager, chief operating officer, or chief executive officer, and the like, is considered to be involved in the operational aspects of the enterprise" and, hence, within the definition of an "owner or operator" under CERCLA. *Id.* at 18,360. Section 101(20)(F) follows EPA's approach virtually verbatim and explicitly ratifies EPA's understanding of the types of "operational functions" that will result in operator liability under CERCLA.[15]

Congress's clarification of the lender liability exemption provides further evidence that Congress intended to impose "operator" liability on an entity—irrespective of its identity or corporate form—that actively participates in, and exercises managerial or decisionmaking control over, the operations of a facility. Congress's action indicates that the term "operate" in Section 107(a)(2) conveys its "ordinary or natural meaning." See *Bailey* v. *United States*, 116 S. Ct. 501, 507 (1995) (relying upon the amendment history of a statutory provision to cast light on Congress's intended meaning).

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[15] In addition, Congress's amendment of Section 101(20) makes clear, in accord with the United States' view (see note 17, *supra*), that the term "participate in management" means "actually participating" in the management or operations of the facility, not "merely having the capacity to influence, or the unexercised right to control" facility operations. 42 U.S.C. 9601(20)(F)(i).

4. *CERCLA's statutory objectives*

In interpreting a statute, the Court may also "look to the provisions of the whole law, and to its object and policy." *E.g.*, *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989); (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 51-52 (1987)). The government's interpretation of the word "operate" to reach any entity that actually operated a facility is also consistent with CERCLA's specific objectives, most importantly, its goal of making "'those responsible for problems caused by the disposal of chemical poisons bear the costs and responsibility for remedying the harmful conditions they created,'" *Dedham Water Co.* v. *Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986) (quoting *United States* v. *Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982)), and creating a "compelling incentive for those in control of hazardous substances to prevent releases and thus protect the public from harm," S. Rep. No. 848, *supra*, at 14, 17-18.

B. The Court Of Appeals' Interpretation Of Section 107(a)(2) Is Incorrect And Departs From The Decisions Of Other Courts Of Appeals

1. *The court of appeals' mistaken reliance on Section 101(20)*

The court of appeals rejected the district court's sensible construction of Section 107(a)(2)'s plain terms. In doing so, the court engaged in a lengthy discussion of canons of construction and general principles of corporate liability, but it paid scant attention to the actual language of Section 107(a)(2). See Pet. App. 7a-12a. It provided no explanation why the term "operated" should not be given its "ordinary or natural meaning." Rather, the court's analysis of the statutory terms is limited to its brief discussion of CERCLA's definition of "owner or operator" as it relates to facilities that have been involuntarily conveyed to a state or local government. *Id.* at 13a; see CERCLA

§ 101(20), 42 U.S.C. 9601(20). The court's counter-intuitive conclusion—that Section 101(20)'s definition of the term "owner or operator" excludes persons who actually controlled the operation of a facility—rests on a fundamental misunderstanding of the definition.

Section 101(20) of CERCLA defines the term "owner or operator" with reference to the context in which the term is used. See 42 U.S.C. 9601(20). When Congress enacted the original version of CERCLA in 1980, Section 101(20)(A) provided in relevant part as follows:

> "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of an abandoned facility, any person who owned, operated, or otherwise controlled activities at such facility immediately prior to such abandonment.

Pub. L. No. 96-510, Tit. I, § 101(20)(A), 94 Stat. 2769. As the text of that provision indicates, Congress saw a need to address a special problem posed by abandoned facilities. Congress recognized that such facilities were likely to be non-operational for some time prior to their abandonment, and it therefore made clear in Section 101(20)(A)(iii) that the term "owner or operator" includes persons who "otherwise controlled activities" at a non-operational site immediately before its abandonment.

When Congress amended CERCLA in 1986, it retained the original version of Section 101(20)(A)(i) and (ii), but it modified clause (iii) to address the question of state liability for abandoned facilities. See Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, Tit. I, § 101(20)(A), 100 Stat. 1615. Congress provided that if a state or local government received "title or control" of a facility through an involuntary mechanism, such

as abandonment, the "owner or operator" would be the person "who owned, operated, or otherwise controlled activities at such facility immediately beforehand." 100 Stat. 1615. Recognizing that those facilities may be non-operational, Congress carried forward the "otherwise controlled" language of the original clause. See CERCLA § 101(20)(A)(iii), 42 U.S.C. 9601(20)(A)(iii).

The court of appeals inferred from Congress's use of the "otherwise controlled" language that "the drafters of the statute distinguished an operator from a person who 'otherwise controlled' a facility." Pet. App. 13a. As the text of the original and amended provision shows, that is simply not the case. Congress retained the "otherwise controlled" language in clause (iii) to make clear that the term "owner or operator" includes persons who "controlled activities" at an inactive facility. That language provides no basis for the illogical conclusion that the term "owner or operator" excludes persons who controlled the operations of an active facility.[16]

2. The decisions of other courts of appeals

Because the court of appeals gave little heed to CERCLA's statutory language, its decision predictably departs from the views of the other courts of appeals that have encountered the question. See Pet. App. 13a. In the

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[16] The court of appeals' reasoning implausibly suggests that Congress intended the term "owner or operator" to include persons having operational control only if the facility has been abandoned. There is no indication in CERCLA's legislative history of any such intent. See Michael P. Healy, *Direct Liability for Hazardous Substance Cleanups Under CERCLA: A Comprehensive Approach*, 42 Case W. Reserve L. Rev. 65, 95-96 (1992). Moreover, given Congress's intent that those who are responsible for creating hazardous conditions, rather than the innocent public, bear the costs of cleanup, it would be incongruous to conclude that those who controlled activities at a facility should be liable only in those circumstances when a facility has been abandoned or conveyed through bankruptcy, foreclosure, or other similar means.

corporate shareholder context, four courts of appeals have squarely interpreted Section 107 to impose operator liability on parent corporations by virtue of their active participation in and exercise of actual control over the operations of their subsidiaries. See *United States* v. *Kayser-Roth Corp.*, *supra*; *Schiavone* v. *Pearce*, *supra*; *Lansford-Coaldale Joint Water Auth.*, *supra* at 1220-1225; *Jacksonville Elec. Auth.* v. *Bernuth Corp.*, 996 F.2d 1107, 1110 (11th Cir. 1993). Those courts recognize that Section 107(a)(2) of CERCLA creates a federal liability standard that, by its plain terms, subjects corporations to direct liability based on their actual involvement in the operation of a subsidiary's facility.

The First Circuit in *Kayser-Roth* held that a parent corporation was directly liable under Section 107(a)(2) for the government's costs in responding to the release of hazardous substances at a subsidiary's facility. 910 F.2d at 26-28. The court determined from its "analysis of the statute and its legislative purpose and history" that a corporation may be found liable as an operator on account of its pervasive involvement in the subsidiary's operations. *Id.* at 26-27. The court noted that other courts have consistently construed the term "operator" to include corporate officers and shareholders who participate in the operation of a facility. *Ibid.* It concluded that a parent corporation that participates in the operation of a subsidiary's facility is similarly liable. *Id.* at 27. See also *John S. Boyd Co.* v. *Boston Gas Co.*, 992 F.2d 401, 407-408 (1st Cir. 1993).

The Second Circuit reached a similar result in *Schiavone*, which involved a private action over the effect of an indemnification agreement on CERCLA liability. 79 F.3d at 250-251. The court observed that a parent corporation may be charged with "operator liability" based on "the independent actions of the parent corporation, evidenced through its control over the polluting site." *Id.* at 254.

That reading of the statute is "both compatible with the statutory language and consistent with CERCLA's broad remedial scheme." See *id.* at 255. See also *Certain Underwriters at Lloyd's* v. *St. Joe Minerals*, 90 F.3d 671, 674 (2d Cir. 1996).

Similarly, the Third Circuit in *Lansford-Coaldale Joint Water Authority* concluded that a parent corporation could be held liable as an operator if "there is evidence of substantial control exercised by one corporation over the activities of the other." 4 F.3d at 1221. The court explicitly followed the test applied in *Kayser-Roth* and the district court decision in this case, stating that the "actual control" standard "hold[s] accountable for environmental violations those corporations which are not mere investors in other corporations, but instead have actively and substantially participated in the corporation's management." *Id.* at 1222. See also *Aluminum Co. of America* v. *Beazer East, Inc.*, 124 F.3d 551, 562-565 (3d Cir. 1997); *FMC Corp.* v. *United States Dep't of Commerce*, 29 F.3d 833, 843 (3d Cir. 1994) (en banc).

Likewise, according to the Eleventh Circuit, "[t]he plain language of the statute leads to the conclusion that a person is liable as an 'operator' when that person actually supervises the activities of the facility. That is, the person must play an active role in the actual management of the enterprise." *Jacksonville Elec. Auth.*, 996 F.2d at 1110. Interpreting "the terms of the statute according to their ordinary meaning," the court concluded that a parent corporation is directly liable under Section 107(a)(2) if the parent "'exercises actual and pervasive control of the subsidiary to the extent of actually involving itself in the daily operations of the subsidiary.'" 996 F.2d at 1110 &

n.3.[17] (quoting *Jacksonville Elec. Auth.* v. *Eppinger & Russell Co.*, 776 F. Supp. 1542, 1547-1548 (M.D. Fla. 1991).

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[17] In addition to the decisions of those courts, the Eighth and Ninth Circuits have indicated in dicta that a parent corporation may be held liable as an operator based on its control over a subsidiary's facility. See *United States* v. *TIC Invest. Corp.*, 68 F.3d 1082, 1091 (8th Cir. 1995), cert. denied, 117 S. Ct. 50 (1996); *AT & T Co.* v. *Compagnie Bruxelles Lambert*, 94 F.3d 586, 590 n.8, opinion supplemented on other grounds, 95 F.3d 1156 (9th Cir. 1996). The Seventh and Tenth Circuits have similarly resolved the analogous issue of whether individual corporate officers may be liable under CERCLA by applying a standard based on personal participation and actual control. See *Sidney S. Arst Co.* v. *Pipefitters Welfare Educ. Fund*, 25 F.3d 417, 420 (7th Cir. 1994); *FMC Corp.* v. *Aero Indus., Inc.*, 998 F.2d 842, 846 (10th Cir. 1993).

The Fourth Circuit has adopted a more expansive standard of operator liability than that urged by the United States or relied upon by the district court in this case. That court has indicated in a private cost recovery action that the mere "authority to control the facility" is sufficient for establishing operator liability. *Nurad, Inc.* v. *William E. Hooper & Sons, Co.*, 966 F.2d 837, 842 (4th Cir.) (liability as applied to tenants at a site), cert. denied, 506 U.S. 940 (1992). The United States does not endorse liability based solely on the "authority to control," as is sometimes urged by private parties.

The Fifth Circuit is the only court of appeals that heretofore had employed the restrictive standard of parent liability that the court of appeals applied in this case. That court initially ruled in a private cost recovery action that a parent corporation's liability must be established through a corporate veil-piercing standard. *Joslyn Mfg. Co.* v. *T.L. James & Co.*, 893 F.2d 80 (5th Cir. 1990), cert. denied, 498 U.S. 1108 (1991). The continuing vitality of that precedent, however, is open to question. That court has since ruled that individual officers and employees may be held directly liable as operators under CERCLA, when "they themselves actually participate in the wrongful conduct prohibited by the Act" and that "this personal liability is distinct from the derivative liability that results from 'piercing the corporate veil.'" *Riverside Market Dev. Corp.* v. *International Bldg. Prods., Inc.*, 931 F.2d 327, 330 (5th Cir.), cert. denied, 502 U.S. 1004 (1991) (quoting *United States* v. *Northeastern Pharmaceutical & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987)).

C. There Is No Warrant For Distorting The Ordinary Meaning of CERCLA's Express Terms Through The Adoption Of State "Veil-Piercing" Rules

1. The distinction between federal liability standards and state veil-piercing rules

Section 107(a)(2) of CERCLA, by its plain terms, establishes a straightforward and sensible rule of operator liability: Any entity (including a parent corporation) that actively participated in, and exercised control over, the operation of a facility is liable, on that basis, as an "operator" of the facility. The court of appeals has erred by supplementing that statutory standard with an additional requirement drawn from state-law principles governing derivative liability. According to that court, a parent corporation is not liable as an operator of a subsidiary's facility—notwithstanding the parent's active participation in, and control over, the operation of the facility—unless there is a basis under state law for "piercing the corporate veil." Pet. App. 15a. The court of appeals' imposition of that extra-legislative requirement has effectively usurped Congress's legislative role and distorted the federal liability standard.[18]

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[18] The court reached that result based, in significant part, on its own notions of proper policy. Pet. App. 14a-15a. At the outset, we note that its policy analysis is itself flawed. First, it is far from clear that "the traditional doctrine of piercing the corporate veil" provides a "relatively bright line" standard. *Id.* at 14a; compare, *e.g.*, *id.* at 29a-31a (Merritt, J., dissenting in part) (describing the federal common law standard); *id.* at 45a-46a (Ryan, J., dissenting) (disputing the majority's interpretation of the Michigan standard). As legal scholars have long observed, the so-called "traditional" doctrine is enveloped in a "mist of metaphors" that has not produced clear or uniform rules. See, *e.g.*, William O. Douglas & Carrol M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L. J. 193, 195 n.8, 218 (1929) (quoting Judge Cardozo's admonitions in *Berkey* v. *Third Avenue Ry. Co.*, 244 N.Y. 84 (1926)); see also note 27, *infra*. Second, it is highly unlikely that the court of appeals' liability standard—which would prevent the government from recovering response costs from those parties that are actually responsible for creating the public danger—would encourage "private sector participation in the cleanup of existing sites." Pet. App. 14a. The court's interpretation would be likely, instead, to thwart CERCLA's central purpose of creating "a compelling incentive for those in control of hazardous substances to prevent releases and thus protect the public from harm." S. Rep. No. 848, *supra*, at 14, 17-18. Of course, even if the court's policy analysis were more persuasive, it is ultimately beside the point. The question of appropriate policy in this area is a matter for Congress, which has spoken to that issue through the liability standard that it has established.

The court of appeals erred first by misconceiving the relevance of a parent-subsidiary corporate structure to the standard of "operator" liability under Section 107(a)(2) and, consequently, by misapplying the equitable doctrine of "piercing the corporate veil." Under general principles of corporate identity, a corporation that owns a separately incorporated subsidiary is generally insulated, by virtue of the subsidiary's separate corporate form, from liability for the *subsidiary's* actions. See, *e.g.*, William O. Douglas & Carroll M. Shanks, *Insulation from Liability Through Subsidiary Corporations*, 39 Yale L. J. 193 (1929). The parent corporation, however, is not insulated from liability for its *own* acts. See, *e.g.*, *United Mine Workers of America* v. *Coronado Coal Co.*, 259 U.S. 344, 395 (1922) ("A corporation is responsible for the wrongs committed by its agents in the course of its business.").[19]

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[19] See also, *e.g.*, 10 *Fletcher Cyclopedia on the Law of Private Corporations* § 4877, at 323 (rev. 1986) ("corporations * * * can commit almost any kind of a tort that individuals can commit, and are liable for the acts of their servants and agents * * *; that is now hornbook law, unless changed by statute"); Phillip I. Blumberg, *The Law of Corporate Groups, Problems of Parent and Subsidiary Corporations Under Statutory Law of General Application* 621 (1989) ("For acts within the scope of authority, the law also imposes liability on the corporation or principal under the doctrine of *respondeat superior*.").

In a situation like the one presented here, where the evidence shows that a parent corporation, through the use of its own agents acting on that parent corporation's behalf, actively participated in the operation of a subsidiary's facility, the parent corporation is directly liable as an operator under federal law. The liability results from the application of the federal standard to the parent corporation's own proven conduct. There is no need to invoke a state's equitable doctrine for "piercing the corporate veil" because that doctrine "simply does not speak to the appropriate analysis of *direct* operator liability" under a federal statute. Pet. App. 38a (Ryan, J., dissenting). See also *id.* at 35a-38a (Ryan, J., dissenting); *id.* at 112a, 124a-125a. Indeed, respondent Aerojet itself repeatedly conceded precisely that point before the court of appeals. Aerojet C.A. Br. as Appellee at 34; Aerojet C.A. Supp. Br. at 20 n.18.[20]

The court of appeals additionally erred in failing to recognize that direct liability and derivative liability denote two analytically distinct concepts and hence require two separate inquiries. See *Lansford-Coaldale*, 4 F.3d at 1220; *Schiavone*, 79 F.3d at 254-255. The court conflated and confused those concepts by holding, in effect, that a parent corporation cannot be held directly liable under Section 107(a)(2) unless that corporation would also be derivatively liable under state veil-piercing standards. As we have explained, the court's ruling (which it has since extended to individual stockholders, see p. 16, *supra*) has no basis in the text of the statute. See pp. 19-25, *supra*. The court's decision has created a new liability standard that misdirects the inquiry away from the central question under Section 107(a)(2) of CERCLA—whether the parent corporation actually "operated" the facility in question—and focuses instead, on variegated state law standards respecting "abuse of the corporate form" (Pet. App. at 15a).[21]

[20] Aerojet conceded that the "statutory term 'operator' and the concept of operator liability are not state law issues; rather, they are federal law issues that federal courts must apply in accordance with the statute." Aerojet C.A. Br. as Appellee at 34. Aerojet further explained that "[s]tate law does not and cannot illuminate the analysis," *ibid.*, and that accordingly, "a parent company can be an 'operator' within the meaning of federal law even in the absence of facts warranting disregard of the corporate form under state law." Aerojet C.A. Supp. Br. at 20 n.18; see also Aerojet C.A. Br. as Appellee at 28-35; Aerojet C.A. Br. as Appellant at 23-26.

2. The limited role of state veil-piercing rules as a supplement to the federal liability standard

Even looking beyond the deficiencies in the court of appeals' reasoning, there is no basis for erecting state veil-piercing rules to insulate a parent corporation from the plain terms of the federal liability standard. As an initial matter, Section 107 of CERCLA counsels against adopting additional requirements for liability beyond those that Congress has specified. Section 107 expressly states that the federal liability standard contained therein ap-

[21] The court of appeals does acknowledge that "at least conceivably" there may exist circumstances for which a parent corporation may be deemed an operator of a subsidiary-owned facility, i.e., "the parent might independently operate the facility in the stead of its subsidiary; or, as a sort of joint venturer, actually operate the facility alongside its subsidiary." Pet. App. 12a, 17a. That formulation, however, appears to restrict "direct liability" to those situations in which the parent corporation's officers and employees actually handle or dispose of the hazardous substances themselves. While the court does not elaborate on its theory of operator liability, it is clear from the court's holding that it would not allow direct liability to be predicated on "the degree of control exerted by the parent over its subsidiary" (*id.* at 18a). Hence, it would not be enough that the parent was involved in "major decision-making and day-to-day operations," actively participated in and controlled "environmental matters," or "exceed[ed] the bounds of an interested investor and enter[ed] the realm of an active operator" (*id.* at 111a). That interpretation cannot be reconciled with the ordinary meaning of the term "operate." See pp 19-25, *supra*.

plies "'[n]otwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b)." 42 U.S.C. 9607(a). Hence, Congress has explicitly directed the courts not to create extra-statutory exceptions to the liability standard set out in the statutory text.

The court of appeals' result is unsound for other reasons as well. Congress legislates "against the background of the total *corpus juris* of the states," *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1996) (internal quotation marks omitted), but it frequently legislates precisely because state law is inadequate to resolve national problems, and it structures federal legislation in ways designed to prevent state law from becoming an obstacle to the achievement of national objectives. This Court has therefore been rightly skeptical when parties attempt to avoid or distort federal obligations by invoking state law rules governing corporate formalities. Federal law manifests a concern with "realities not forms." *Anderson* v. *Abbott*, 321 U.S. 349, 363 (1944).[22]

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[22] See *Anderson*, 321 U.S. at 363 ("We are dealing here with a principle of [National Bank Act] liability which is concerned with realities not forms. * * * To allow this holding company device to succeed would be to put the policy of double liability at the mercy of corporation finance."); see also, *e.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 772-773 (1984) (rejecting use of the intra-enterprise conspiracy doctrine under the Sherman Act because it "looks to the form of an enterprise's structure and ignores the reality"); *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 623 (1983) (repeating, in the context of the Foreign Sovereign Immunities Act, Justice (then Judge) Cardozo's warning "against permitting worn epithets" respecting piercing the corporate veil "to substitute for rigorous analysis"); *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 403-404 (1960) (holding that the liability of a parent corporation under the National Labor Relations Act depends "on whether in fact the economic enterprise is one, the corporate forms being largely paper arrangements that do not reflect the business realities").

Such skepticism is justified here. The state courts have developed rules respecting derivative liability, such as "corporate veil-piercing," to provide equitable relief in situations where it is just to charge one entity with responsibility for the actions of another. It may be appropriate to conclude that Congress has implicitly adopted those rules, to the extent that they are consistent with legislative intent, to supplement the reach of a federal liability standard. In particular, it may be reasonable to employ a state veil-piercing rule for the same reason that it is applied in the state court system: *viz.*, to ensure that an entity that has, in fact, violated a legal standard is not absolved of liability based on distinctions of corporate form.[23]

The court of appeals' decision in this case, however, rests on a different principle. As we have explained, CERCLA by its plain terms imposes liability not only on entities that "owned" a facility, but also on entities that "operated" the facility. CERCLA makes clear that "Congress has singled out operators for liability, irrespective of their corporate form." Pet. App. 35a (Ryan, J., dissenting). The court nevertheless concluded that a state veil-piercing rule should be applied to *contract* the express terms of a federal liability standard based on considerations of corporate form and to *immunize* a corporate entity that would be liable under the plain terms of the fed-

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[23] The district court's decision respecting Aerojet's liability as a "present owner" of the Muskegon site under Section 107(a)(1) of CERCLA, 42 U.S.C. 9607(a)(1), illustrates that point. The court concluded that Aerojet was not directly liable as a "present owner," because legal title rests with its Cordova/Michigan subsidiary. Pet. App. 119a. The court nevertheless considered whether Aerojet could be held derivatively liable as a "present owner" under the CERCLA liability scheme under Michigan's veil-piercing rules. *Id.* at 120a-122a. The court of appeals rejected the district court's interpretation of Michigan law, but it did not dispute that a veil-piercing inquiry would be appropriate in that context. *Id.* at 20a-21a.

eral statute. That use of state law subverts congressional intent by insulating from liability entities that had, in fact, actually "operated" the site. *Id.* at 67a-77a, 94a-100a, 110a-112a, 123a-124a.[24]

Congress imposed direct liability on both "owners" *and* "operators" to ensure that all of the entities that were actually responsible for creation of the hazardous conditions would share responsibility for the costs of response. It is therefore unsound to infer that Congress implicitly adopted state veil-piercing rules that would frustrate that objective. That interpretation would "impute to Congress a purpose to paralyze with one hand what it sought to promote with the other." *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947). Indeed, that result could shield from liability those parties who, by virtue of their specific conduct, were most responsible for creating the dangerous conditions and precipitating the need for a federal response. See, *e.g.*, Pet. App. 65a-77a, 110a-112a (describing CPC's extensive role as an "active operator" of the Muskegon site).

In short, Congress has created a federal liability standard, and the express terms and objectives of the standard should not be thwarted by application of inapposite state law. See, *e.g.*, *Anderson*, 321 U.S. at 365. This Court has repeatedly rejected, in a wide variety of statutory contexts, similar attempts to defeat the clear import of federal statutes, or to distort their application, through the invocation of state law principles respecting corporate form. See, *e.g.*, *Copperweld Corp.* v. *Independence Tube Corp.*,

[24] The district court recognized this principle and correctly concluded that it need not engage in the veil-piercing inquiry with respect to their liability as past operators, because the facts respecting CPC's and Aerojet's active participation in and control over the Muskegon site established that they had in fact operated the site within the meaning of the plain terms of the federal standard. Pet. App. 112a, 123a-125a.

467 U.S. 752, 772-773 (1984) (Sherman Act); *First National City Bank* v. *Banco Para El Comercio Exterior de Cuba*, 462 U.S. 611, 628-633 (1983) (Foreign Sovereign Immunities Act); *Radio & Television Broadcast Technicians Local Union 1264* v. *Broadcast Serv., Inc.*, 380 U.S. 255, 256 (1965) (National Labor Relations Act); *NLRB* v. *Deena Artware, Inc.*, 361 U.S. 398, 403-404 (1960) (same); *Anderson*, 321 U.S. at 361-363 (Federal Reserve Act and National Bank Act). The lower courts have likewise repeatedly rejected such attempts to avoid the reach of federal legislation.[25]

[25] See, *e.g.*, *Alman* v. *Danin*, 801 F.2d 1, 3-4 (1st Cir. 1986) (in deciding whether a parent corporation may be held liable for acting through a subsidiary under the Employment Retirement Income Security Act, "federal courts will look closely at the purpose of the federal statute to determine whether the statute places importance on the corporate form, an inquiry that usually gives less respect to the corporate form than does the strict common law alter ego doctrine.") (quoting *Town of Brookline* v. *Garusch*, 667 F.2d 215, 221 (1st Cir. 1981); *United States* v. *J.B. Williams Co.*, 498 F.2d 414, 437 (2d Cir. 1974) ("We do not think Congress meant the policies of [the Federal Trade Commission Act] to be defeated by the fragmentation of an integrated business into a congeries of corporate entities, however much these might properly be respected for other purposes.") (internal quotations marks omitted); *Bowater S.S. Co.* v. *Patterson*, 303 F.2d 369, 372 (2d Cir.) ("Assuming, as we may, that [separate companies] had sufficient independence to be regarded, in contract or tort litigation, as separate both from the ultimate parent * * * and from each other, it does not follow that they ought be so regarded for application of the Norris-LaGuardia Act. Whether a subsidiary corporation is to be considered a separate entity 'cannot be asked, or answered, *in vacuo*'; the issues in each case must be resolved in the light of the policy underlying the applicable legal rule, whether of statute or common law.") (citations omitted), cert. denied, 371 U.S. 860 (1962). See generally Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidiary Corporation Liabilities*, 28 Conn. L. Rev. 295 (1996).

3. The practical consequences of the court of appeals' decision

The court of appeals' creation of a judge-made exception to the plain terms of Section 107(a)(2) would undermine Congress's specific purposes in enacting a comprehensive and national regulatory scheme for the cleanup of hazardous waste sites. It would frustrate Congress's intent to provide a national solution to the nationwide public health and environmental problems resulting from hazardous waste disposal.[26] The court of appeals' decision would subject a responsible party's liability to the vagaries of individual state law standards regarding the equitable doctrine of corporate veil piercing, resulting in inconsistent findings of liability under CERCLA, and encouraging the kind of geographic disparities that Congress sought to avoid.[27]

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[26] Congress found that the national scale of the problem required uniform regulation that only federal legislation could create. See S. Rep. No. 848, *supra*, at 11; 126 Cong. Reg. 31,968-31,969 (1980) (remarks of Rep. Florio, a principal sponsor of CERCLA); see also *In re Acushnet River & New Bedford Harbor Proceedings re Alleged PCB Pollution*, 675 F. Supp. 22, 31 (D. Mass. 1987) ("One can hardly imagine a federal program more demanding of national uniformity than environmental protection.").

[27] See S. Rep. No. 848, *supra*, at 11 (explaining the need for CERCLA because accidents or other incidents involving hazardous substances release are subject to "laws which vary from State to State"). Standards for piercing the corporate veil vary widely from State to State. See note 18, *supra*, see also Phillip I. Blumberg & Linda Evans Blumberg, *The Law of Corporate Groups: Substantive Law* 169-181 (1987) (reviewing the state law variations in corporate veil piercing standards for tort liability); Note, *Piercing the Corporate Law Veil: The Alter Ego Doctrine Under Federal Common Law*, 95 Harv. L. Rev. 853, 854 (1982) (observing that "different states have adopted widely divergent and sometimes contradictory standards under the general rubric of the alter ego doctrine").

The court of appeals' holding would thwart the fundamental policy expressed in CERCLA that those who are responsible for creating hazardous conditions, rather than the innocent public, should bear the costs of responding to those hazards.[28] When a parent corporation steps beyond its role as a stockholder of a subsidiary and actually participates in the day-to-day operation of a subsidiary and its facility, CERCLA dictates that the corporation should be responsible, together with other parties that owned or operated the facility, for the costs of cleanup. The court of appeals' rule would absolve parent corporations of liability, even though they participated in the operation of the facility and share responsibility for the conditions at the site. That result would diminish the fairness of CERCLA's liability provisions, which subject parties to liability on the basis of their actions rather than their corporate form.[29]

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[28] See S. Rep. No. 848, *supra*, at 13; H.R. Rep. No. 1016, *supra*, Pt I, at 17; see also *United States* v. *Aceto Agric. Chem. Corp.*, 872 F.2d 1373, 1377 (8th Cir. 1989); *United States* v. *Monsanto Co.*, 858 F.2d 160, 167 n.8 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); *Dedham Water Co.*, 805 F.2d at 1081. The liability provision reflects a policy of "fairness and equity" by ensuring that cleanup costs "are borne by the persons who create such risks rather than by the injured parties who are powerless to protect themselves." S. Rep. No. 848, *supra*, at 33. Imposition of liability on "those who caused chemical harm * * * assures that those who benefit financially from a commercial activity internalize the health and environmental costs of that activity into the costs of doing business." *Id.* at 13.

[29] This case particularly illustrates why Congress empowered the United States to seek cost recovery from parent corporations in appropriate situations. The Muskegon site is "one of the nation's most severely contaminated areas." Pet. App. 56a. The total expenditures for cleaning up hazards left by its owners and operators will likely exceed $100 million. Among potentially responsible parties, Ott I, Ott II, and Story no longer exist, while the Cordova companies, from the outset, have had little capital. See *id.* at 93a, 99a-100a. Hence, CPC and Aerojet are not only responsible for the hazardous conditions at the

D. The District Court Correctly Applied The Federal Liability Standard To The Evidence And Properly Concluded That CPC And Aerojet, During Separate Time Periods, Had Each Operated The Muskegon Site

1. The district court's identification of the legal standard

The district court correctly recognized that the express language of Section 107(a)(2) imposes liability on those persons who have "operated" a contaminated facility, regardless of their relationship with the owner of the facility. Applying prevailing law, the court concluded that a parent corporation may be held directly liable under Section 107(a)(2) as an operator of its subsidiary's facility when it actively participates in, and exercises control over, the operations of the subsidiary in a manner that constitutes operation of the facility. See Pet. App. 104a-108a.[30]

Muskegon site, but they are also the only responsible parties that can contribute meaningfully to the cleanup of the site.

[30] The district court followed the approach of *Kayser-Roth*, in which the First Circuit declared that "[t]o be an operator requires more than merely complete ownership and the concomitant general authority or ability to control that comes with ownership." 910 F.2d at 27. "At a minimum, it requires active involvement in the activities of the subsidiary." *Ibid*. As the Third Circuit has explained:

> The factors courts should consider focus on the extent of the corporation's involvement in the other corporation's day-to-day operations and its policy-making decisions. We understand the actual control standard to hold accountable for environmental violations those corporations which are not mere investors in other corporations, but instead have actively and substantially participated in the corporation's management.

Lansford-Coaldale, 4 F.3d at 1222 (citation omitted). Under the Third Circuit's "actual control" standard, a corporation must have made "the day-to-day operating decisions concerning the facility or exercised 'pervasive control' over its policymaking." *Beazer East*, 124 F.3d at

Under familiar principles of corporate law, a parent corporation can, and typically does, exercise general authority over a wholly-owned subsidiary through stock ownership, which allows the parent to choose the subsidiary's board of directors and to vote on general matters of corporate governance put forward by the board. See 2 *Fletcher Cyclopedia of the Law of Private Corporations* § 505 (1990); Harry G. Henn & John R. Alexander, *Laws of Corporations* § 207 (1983). The district court recognized that the parent corporation's exercise of those traditional powers does not in itself result in CERCLA liability. Pet. App. 107a.[31]

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564. As the Eleventh Circuit has further noted, in determining whether a corporation has "operated" a facility within the meaning of Section 107(a)(2), a court should "seek more than just indicia of a parent-subsidiary relationship," and in doing so, may look for evidence that would demonstrate that a parent corporation was actively involved in a subsidiary's "occupational business affairs" or that the parent itself actually participated in the contamination. *Jacksonville Elec. Auth.*, 996 F.2d at 1111.

[31] As the Third Circuit in *Beazer East* recently concluded, the mere fact that two corporate shareholders, by virtue of their stock ownership, each elected two members to the board of directors of the corporation at issue in that case is not sufficient to establish the "actual control" necessary to impose CERCLA operator liability. 124 F.3d at 563-565. That conduct is entirely consistent with the investment relationship among the parties and, therefore, absent evidence that the corporate shareholders exercised control over the day-to-day operating decisions of the corporation, cannot be the basis for liability as an operator of that corporation's facility. In contrast to the instant case, the district court in *Beazer East* found that the board of directors did not become involved in the corporation's day-to-day management, its plant operations, or in any waste management practices. Rather, the board simply performed the functions typically performed by boards of directors, including oversight of the corporation's assets and liabilities, approval of the corporation's mission and strategy, and the hiring of upper management.

By virtue of its controlling stock ownership, a parent corporation will frequently place its officers on the board of the subsidiary. The district court properly recognized that such participation will not, by itself, result in CERCLA liability. Although a board of directors has nominally broad authority, the typical board cannot and does not "manage all of the business of a large company in the usual sense of that term." Edward Brodsky & M. Patricia Admanski, *Law of Corporate Officers and Directors; Rights, Duties, and Liabilities* § 1.02 (1997). Rather, the typical board delegates the day-to-day management to executive officers and monitors their performance. *Ibid.*; see Henn & Alexander, *supra*, at §§ 219, 223; Harvey Gelb, *Director Due Care Liability: An Assessment of the New Statutes*, 61 Temple L. Rev. 13, 14 (1988).

Thus, in the usual situation, the subsidiary's own executive officers, acting on behalf of the subsidiary, are responsible for managing the subsidiary and "operating" the subsidiary's facility. If the parent corporation, however, departs from the typical practice and employs its own agents as executive officers (or as board members performing the typical functions of an executive officer) to manage the subsidiary, then a court may conclude that the parent corporation is, in fact, "operating" the subsidiary's facility. The factual inquiry for a court is whether the evidence demonstrates that the parent corporation's officers exercised control over the operations and management of the subsidiary's activities in a way that establishes that those officers actually participated in the operation of the subsidiary's facility. See Pet. App. 105a-107a.[32]

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[32] While the district court recognized that the determination of whether a parent corporation has "operated" a facility requires an inherently fact-based inquiry into the totality of circumstances presented, the court articulated some of the factors it considered relevant to deciding whether each parent corporation was an operator-in-fact of the Muskegon facility, including: the parent's participation in the subsidiary's board of directors, management, day-to-day operations, and specific policy matters, including areas such as manufacturing, finances, personnel and waste disposal; the facts leading up to the subsidiary's origin and the reasons for its existence; and to a lesser extent, the parent's level of financial monitoring and its cooperation or consolidation with the subsidiary's accounting, legal, and research functions. Pet. App. 107a-108a.

2. The district court's application of the legal standard to the facts of this case

The district court made extensive factual findings in support of its conclusion that CPC and Aerojet, during separate time periods, each operated the Muskegon site through the decisionmaking hierarchies of their respective wholly owned subsidiaries. See Pet. App. 58a-100a. While the court of appeals held that the district court had applied the wrong standard of liability, the court of appeals did not reject or cast doubt on any of the district court's factual findings and, indeed, relied on them. See *id.* 16a-17a, 20a-22a. They therefore may be treated as conclusive in this Court. See, *e.g.*, *Goodman* v. *Lukens Steel Co.*, 482 U.S. 656, 665 (1987).

a. *CPC*. In the case of CPC, the district court found that the corporation had placed its own high level officers in key management positions of its subsidiary specifically to ensure that CPC would actively participate in and maintain close control over the day-to-day running of the subsidiary's business at the Muskegon site. See Pet. App. 67a-77a, 110a-112a. Those CPC officers, including Arnold Ott, James Eiszner, and Beverly Warner, "exerted significant control and bore ultimate responsibility over decision-making at the subsidiary in areas including waste disposal, sales, marketing, manufacturing, purchasing and personnel." *Id.* at 71a.

For example, the district court found that Beverly Warner, who worked out of CPC's headquarters in New York while president of CPC's development company and Ott II's chief executive officer, "controlled decisions including production, pricing and plant operations at Ott II," which "actually undermined" the operations of Ott II. Pet. App. 70a-71a. According to James Eiszner, who eventually became CPC's chief executive officer, Warner "'made some terrible, terrible management decisions which were probably what led'" to the sale of Ott II in 1972. *Id.* at 71a (quoting Eiszner's criticisms). Indeed, Eiszner himself was criticized during his tenure as an Ott II executive officer by the Ott II board of directors for paying too much attention to the interests of CPC. *Ibid.*

Significantly, CPC also actively participated in Ott II's environmental matters at the Muskegon site. CPC's environmental affairs director, G.R.D. Williams, coordinated all pollution activities for CPC and its divisions and subsidiaries and became "heavily involved" in environmental issues and setting environmental policies at Ott II. Pet. App. 74a-75a. For example, as a result of Williams' direct participation in Ott II's waste disposal matters and discussions with Michigan state officials, Ott II's officers abandoned plans for a biological waste treatment facility at the Muskegon site despite recommendations of the subsidiary's plant manager and outside consultants that biological treatment was necessary. *Id.* at 75a; C.A. App. 1987, 1996, 2160, 2180 (Trial Exhs. 322, 323, 355, 358; Trial Tr. 12-14, C.A. App. 800). Moreover, Williams repeatedly controlled the interaction between Ott II officials and state and federal regulators regarding waste disposal and instructed Ott II's officers "to consult with CPC before responding to regulatory questionnaires or other inquiries." Pet. App. 75a-76a. Similarly, it was a CPC attorney, Hanes Heller, who negotiated with the State of Michigan

to obtain the use of a county wastewater treatment system for the operations at the Muskegon site. *Id.* at 76a.

Furthermore, the district court found that CPC's involvement in Ott II's financial affairs involved more than mere review and oversight. For example, CPC made loans to its subsidiary in excess of $5 million from 1965 to 1971 and assumed several of the subsidiary's loans. Pet. App. 77a. In addition, Ott II's funds were commingled with CPC's funds. CPC also limited the amount of capital expenditures permitted by Ott II without prior approval from CPC's board of directors or development company. *Ibid.* CPC officials also repeatedly participated in the labor and other business matters of Ott II. *Ibid.*

Based on these and many other findings, the district court determined that "[t]he evidence shows a level of participation and control by CPC that exceeds the bounds of an interested investor and enters the realm of an active operator." Pet. App. 111a. The district court correctly found that CPC actively participated in, and exercised control over, the Muskegon site. The district court properly concluded that CPC is therefore liable under Section 107(a)(2) as an operator of the Muskegon site. *Id.* at 112a.

b. *Aerojet*. The district court found that Aerojet similarly engaged in active participation and control with respect to the operation of the Muskegon site during a later time period. Pet. App. 94a-100a, 123a-124a. During the relevant time period, the subsidiaries' boards were "inactive and nearly nonexistent." *Id.* at 96a. Aerojet's high-level corporate officers dominated the management of the wholly owned subsidiaries and thereby controlled the policymaking and decisionmaking in all facets of the subsidiaries' business at the Muskegon site, including sales, marketing, manufacturing and waste disposal. *Id.* at 97a-99a. In fact, Aerojet so completely controlled the finances of the Cordova companies that neither subsidiary was permitted to maintain separate bank accounts. *Id.* at 99a.

As with CPC's involvement with its subsidiary, Aerojet's participation in and control over the management and decisionmaking at the Cordova companies shows that Aerojet "operated" the facility at the Muskegon site. Pet. App. 124a. Aerojet noted in the court of appeals that "[w]here a parent corporation actively participates in its subsidiary's management at the time the subsidiary is disposing of its waste at its facility, the parent corporation has the control necessary to be subject to liability under CERCLA as an operator of its subsidiary's waste disposal sites." Aerojet C.A. Br. as Appellee at 32. Furthermore, Aerojet has not contested in the court of appeals, or in its brief in opposition in this Court, that the record demonstrates the "active participation and actual control" necessary to establish that Aerojet "operated" the Muskegon site. Instead, Aerojet has attempted to avoid liability on other grounds. See Aerojet Br. in Opp. at 11-17. This Court should accordingly reverse the court of appeals' judgment with respect to Aerojet's liability as an operator under Section 107(a)(2).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

Section 101(20) through (21) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) 42 U.S.C. 9601 *et seq.*, provides in relevant part:

§ 9601. Definitions

* * * * *

(20)(A) The term "owner or operator" means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated, or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

* * * * *

(D) The term "owner or operator" does not include a unit of State or local government which acquired ownership or control involuntarily through bankruptcy, tax delinquency, abandonment, or other circumstances in which the government involuntarily acquires title by virtue of its function as sovereign. The exclusion provided under this paragraph shall not apply to any State or local government which has caused or contributed to the release or threatened

release of a hazardous substance from the facility, and such a State or local government shall be subject to the provisions of this chapter in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 9607 of this title.

(E) Exclusion of lenders not participants in management

(i) Indicia of ownership to protect security

The term "owner or operator" does not include a person that is a lender that, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect the security interest of the person in the vessel or facility.

(ii) Foreclosure

The term "owner or operator" does not include a person that is a lender that did not participate in management of a vessel or facility prior to foreclosure, notwithstanding that the person—

(I) forecloses on the vessel or facility; and

(II) after foreclosure, sells, re-leases (in the case of a lease finance transaction), or liquidates the vessel or facility, maintains business activities, winds up operations, undertakes a response action under section 9607(d)(1) of this title or under the direction of an on-scene coordinator appointed under the National Contingency Plan, with respect to the vessel or

facility, or takes any other measure to preserve, protect, or prepare the vessel or facility prior to sale or disposition,

if the person seeks to sell, re-lease (in the case of a lease finance transaction), or otherwise divest the person of the vessel or facility at the earliest practicable, commercially reasonable time, on commercially reasonable terms, taking into account market conditions and legal and regulatory requirements.

(F) Participation in management

For purposes of subparagraph (E)—

(i) the term "participate in management"—

(I) means actually participating in the management or operational affairs of a vessel or facility; and

(II) does not include merely having the capacity to influence, or the unexercised right to control, vessel or facility operations;

(ii) a person that is a lender and that holds indicia of ownership primarily to protect a security interest in a vessel or facility shall be considered to participate in management only if, while the borrower is still in possession of the vessel or facility encumbered by the security interest, the person—

(I) exercises decisionmaking control over the environmental compliance related to the vessel or facility, such that the person has undertaken

responsibility for the hazardous substance handling or disposal practices related to the vessel or facility; or

(II) exercises control at a level comparable to that of a manager of the vessel or facility, such that the person has assumed or manifested responsibility—

(aa) for the overall management of the vessel or facility encompassing day-to-day decision-making with respect to environmental compliance; or

(bb) over all or substantially all of the operational functions (as distinguished from financial or administrative functions) of the vessel or facility other than the function of environmental compliance;

(iii) the term "participate in management" does not include performing an act or failing to act prior to the time at which a security interest is created in a vessel or facility; and

(iv) the term "participate in management" does not include—

(I) holding a security interest or abandoning or releasing a security interest;

(II) including in the terms of an extension of credit, or in a contract or security agreement relating to the extension, a covenant, warranty, or other term or condition

that relates to environmental compliance;

(III) monitoring or enforcing the terms and conditions of the extension of credit or security interest;

(IV) monitoring or undertaking 1 or more inspections of the vessel or facility;

(V) requiring a response action or other lawful means of addressing the release or threatened release of a hazardous substance in connection with the vessel or facility prior to, during, or on the expiration of the term of the extension of credit;

(VI) providing financial or other advice or counseling in an effort to mitigate, prevent, or cure default or diminution in the value of the vessel or facility;

(VII) restructuring, renegotiating, or otherwise agreeing to alter the terms and conditions of the extension of credit or security interest, exercising forbearance;

(VIII) exercising other remedies that may be available under applicable law for the breach of a term or condition of the extension of credit or security agreement; or

(IX) conducting a response action under section 9607(d) of this title or under the direction of an on-scene

coordinator appointed under the National Contingency Plan,

if the actions do not rise to the level of participating in management (within the meaning of clauses (i) and (ii)).

(G) Other terms

As used in this chapter:

* * * * *

(ii) Financial or administrative function

The term "financial or administrative function" includes a function such as that of a credit manager, accounts payable officer, accounts receivable officer, personnel manager, comptroller, or chief financial officer, or a similar function.

* * * * *

(v) Operational function

The term "operational function" includes a function such as that of a facility or plant manager, operations manager, chief operating officer, or chief executive officer.

* * * * *

(21) The term "person" means an individual, firm, corporation, association, partnership, consortium, joint venture, commercial entity, United States Government, State, municipality, commission, political subdivision of a State, or any interstate body.

42 U.S.C. 9601(20) - (21) (Supp. II. 1996).

Section 107(a) through (b) of CERCLA provides in relevant part as follows:

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; * * *

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

* * * * *

(b) Defenses

There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—

(1) an act of God;

(2) an act of war;

(3) an act or omission of a third party other than an employee or agent of the defendant, or than one whose act or omission occurs in connection with a contractual relationship, existing directly or indirectly, with the defendant (except where the sole contractual arrangement arises from a published tariff and acceptance for carriage by a common carrier by rail), if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned, taking into consideration the characteristics of such hazardous substance, in light of all relevant facts and circumstances, and (b) he took precautions against

foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions; or

(4) any combination of the foregoing paragraphs. –

42 U.S.C. 9607(a) - (b).